(2012) 01 MAD CK 0208

Madras High Court

Case No: Writ Petition No. 20466 of 2007 and M.P. No"s. 1 of 2007 and 1 of 2008

State Express Transport Corporation Tamil Nadu Limited	APPELLANT
Vs	
The Joint Commissioner of Labour (Conciliation),Chennai and G. Ravikumar	RESPONDENT

Date of Decision: Jan. 11, 2012

Acts Referred:

- Industrial Disputes Act, 1947 - Section 33(2), 33A

Citation: (2012) 01 MAD CK 0208

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: G. Muniratnam, for the Appellant; P.S. Sivashanmugasundaram, AGP for R1 and Mr. S.T. Varadarajulu for R2, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru

1. The Writ Petition is filed by the State owned Transport Corporation. In this writ petition, they have come forward to challenge an order passed

by the first respondent viz., Joint Commissioner of Labour (Conciliation), Chennai in A.P. No. 71 of 2005 dated 21.04.2006. By the impugned

order, the authority declined to grant approval for dismissal of the second respondent.

2. The second respondent was employed as a Driver-cum- Conductor in the petitioner Corporation. He was initially engaged on daily wages and

subsequently, he was made permanent in the year 1988. Due to viral hepatitis, he took leave from 21.01.2004 and he orally informed his leave to

the Branch Manager. He had taken treatment for the disease and the doctor who examined him initially advised him to take leave till 30.01.2004.

On 31.01.2004, when he reported for duty, the Branch Manager told him that he was transferred to Madurai Depot. In the meantime, the viral

hepatitis fever started again and he had to continue his treatment further. When he informed this to the Branch Manager of Trichy Depot, he asked

the second respondent to report to the Branch Manager of Madurai Depot. But the Branch Manager of the Madurai Depot informed him that he

had not received any information regarding his transfer. After getting medical fitness certificate, when he reported for duty to the Branch Manager

of Madurai Depot, he asked him to meet the General Manager.

3. In the mean while, petitioner Corporation have initiated disciplinary action on grounds of alleged unauthorised absence. A charge memo dated

30.01.2004 was given to him. Subsequently, it was followed by an enquiry. The Enquiry Officer gave his findings. Based upon the findings, a

second show cause notice dated 30.09.2004 was given to him. Finally, he was dismissed from service by an order dated 07.06.2005. He was

also offered a sum of Rs.5961/- towards one month pay in lieu of notice. Since at the relevant time, conciliation proceedings were pending towards

general charter of demands, an approval petition was filed before the Conciliation Officer.

4. The said petition was taken on file as A.P. No. 71 of 2005 and notice was issued to the second respondent. The second respondent filed a

claim statement before the authority. The petitioner Corporation filed 10 documents which were marked as Exs.A1 to A10. The authority found

that so far as enquiry is concerned, it was not done in accordance with the principles of natural justice. It also found there was no lack of bonafide

on the part of the Corporation in initiating the action. It also found that Rs.5961/- is commensurate with the last drawn wages drawn by him. But

on two grounds viz., that the application was not filed as part of the same transaction and there was a delay of 23 days in filing an application, the

authority held it is not part of the same transaction. While dismissal was on 07.06.2005, the approval petition was filed on 30.06.2005. Secondly,

the authority also found that neither there was any evidence before the Enquiry Officer nor before the authority to find out any prima facie case to

hold the workman guilty. The authority recorded that the petitioner having sought for an approval did not file the enquiry proceedings so as to

satisfy him that in the enquiry recorded, legal evidence was collected and that the enquiry was held in accordance with the principles of natural

justice.

5. In the affidavit filed in support of the writ petition, the petitioner has not stated as to why the enquiry proceedings was not filed before the

authority so as to satisfy him that there was a prima facie case to hold the workman guilty. On the other hand, except filing the findings of the

Enquiry Officer, the petitioner Corporation did not fulfill its statutory obligation in convincing the authorities. Therefore, no fault can be found with.

Though the petitioner contended that 23 days is a reasonable time, this Court is not inclined to agree with the same.

6. As the issue involves an interpretation of Section 33(2) of the Industrial Disputes Act, 1947, it is necessary to extract the said provision of law:

Section 33(2): During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing

orders applicable to a workman concerned in such dispute (or, where there are no such standing orders, in accordance with the terms of the

contract, whether express or implied, between him and the workman),

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the

commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made

by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(emphasis added)

7. The Supreme Court vide its judgment in Strawboard Manufacturing Co. Vs. Gobind, had an occasion to consider the scope of Section 33(2)

(b) of the Industrial Disputes Act, 1947. The Supreme Court had explained the proviso to Section 33(2)(b) of the Act. In pages 425 and 426 of

the Report it was observed as follows:-

The next question is as to when should an application be made. In this connection, our attention was drawn to Section 33A of the Act which gives

a right to the employer to apply for redress in case an employer contravenes the provision of S.33 and there is no doubt that the proviso to Section

33(2)(b) should be so interpreted as not to whittle down the protection provided by S.33A. As we read the proviso, we are of opinion that it

contemplates the three things mentioned therein, namely,

(i) dismissal or discharge;

(ii) payment of wages; and

(iii) making of an application for approval,

to be simultaneous and to be part of the same transaction, so that the employer when he takes action u/s 33(2) by dismissing or discharging an

employee, should immediately pay him or offer to pay him wages for one month and also makes an application to the tribunal for approval at the

same time. When, however, we say that the employer must take action simultaneously or immediately, we do not mean that literally, for when three

things are to be done, they cannot be done simultaneously but can only be done one after the other. What we mean is that the employer''s conduct

should show that the three things contemplated under the proviso, namely,

(i) dismissal or discharge;

(ii) payment of wages; and

(iii) making of the application

are parts of the same transaction. If that is done, there will be no occasion to fear that the employee''s right under S.33A would be affected. The

question whether the application was made as part of the same transaction, or at the same time when the action was taken, would be a question of

fact and will depend upon the circumstances of each case.

We may now refer to certain cases which have been relied upon by either side. The main case on which learned counsel for the respondents relies

is Premier Automobiles Ltd. Vs. Ramachandra Bhimayya Polkam,). In that case, the Bombay High Court held that the application should be

made before the action has been taken by the employer and that it was not correct to infer from the use of the word ""approval"" in the proviso that

the legislature intended that such an application should be made after the action had been taken. The High Court has pointed out that there is

apparent conflict between the first and last part of the proviso and the view it took was with the object of harmonizing the two parts. This view has

been followed by the Gujarat High Court in Indian Extractions (Private) Limited Vs. A.V. Vyas, Conciliation Officer (AIR (1961) Guj. 22) though

with some hesitation. With respect we feel that it is not necessary to read the words ""action taken"" in the proviso as equal to ""action proposed to

be taken"" as the Bombay High Court has done and that the apparent conflict between the two parts of the proviso can be harmonized, as we have

indicated above, leaving it open to the employer to dismiss or discharge the employee and at the same time pay him the necessary wages and make

an application to the authority concerned for approval of the action taken. The contrary view has been taken by the Calcutta High Court in Metal

Press Works Ltd. Vs. Deb (H.R.) and Others, where it has been held that payment of wages and the making of the application should be

simultaneous with the order of discharge or dismissal. It has further been pointed out that

the word ""simultaneously"" must of course be taken reasonably and a motion of split-second timing should not be imported. It should be done at

once and without delay.

and it will depend upon the facts of each case whether the application had been made at once or without delay. This, we think, is the correct view

to take.

Let us, therefore, see what has happened in this case. The appellant concern is situate at Saharanpur while one tribunal was at Meerut and the

other at Allahabad. What the appellant did was to pass an order of dismissal on 1 February 1960. On the same day, he sent two applications by

post addressed to the two tribunals. The application at Meerut was received on 3 February and the application at Allahabad on 4 February 1960.

In these circumstances, we are of opinion that the appellant had made the application to the tribunal simultaneously and without delay on its passing

the order of dismissal and its action was, therefore, in accordance with the proviso. The view taken by the labour Court that the application must

be made before dismissing the respondent, is not correct. The appellant in this case had complied with the proviso to Section 33(2)(b) when it

dismissed the workman, paid him or offered to pay the necessary wages and at the same time sent the application by post to the tribunal

concerned for approval of the action taken by it.

8. The Supreme Court, once again, considered the scope of proviso to Section 33(2)(b) of the Act in the judgment in Calcutta State Transport

Corporation Vs. Md. Noor Alam, . In that case, the Court also referred to Strawboard Manufacturing Co. Vs. Gobind, and in paragraph 4, it was

observed as follows:-

4.....The employer''s conduct should show that the three things contemplated under the proviso are parts of the same transaction. (See

Strawboard Manufacturing Co. Vs. Gobind,) In P.H. Kalyani Vs. Air France Calcutta, the order of dismissal was passed on May 28, 1960 and

was communicated to the employee on May 30,1960. The wages were offered to him at the same time when the order was communicated. An

application was made under S.33(2)(b) on the same day. It was held that the application was in accordance with the proviso to S.33(2)(b). This

decision shows that similar action has to be taken in these matters but that does not mean that all the three things mentioned before should be done

on the same day. It is the conduct of the employer that has to be considered from the point of view of finding out whether the dismissal or

discharge, payment of wages and making of the application for approval form a part of the same transaction. A difference of a day in doing one

thing or the other may not be of materials consequence so long as it is clear that the employer meant to do all the three things as part of one and the

same transaction. No hard and fast rule can be laid down in these matters. Each case must be decided on its own facts.

(Emphasis added)

9. The Supreme Court in the judgments cited have considered as to what was meant by the ""same transaction"" and held it has to be seen in the

facts and circumstances of each case. In the case of Calcutta State Transport Corporation Vs. Md. Noor Alam, the Supreme Court held that a

day''s delay cannot be said to be material consequence so long as it was clear that the employer had meant to do all the three things as part of one

and the same transaction. In the case of Strawboard Manufacturing Co. Vs. Gobind, , the Supreme Court rejected the argument that approval

should be obtained before dismissal. The Supreme Court had held that the word ""simultaneously"" must of course be taken reasonably and a motion

of split-second timing should not be imported. It should be done at once and without delay. In the present case, the Authority had categorically

held that 23 days delay was unexplained and therefore, the time gap is too large.

10. In the light of the principles enunciated in the above decisions of the Supreme Court holding that action should be taken at the same

transaction, the writ stands dismissed. Consequently, connected miscellaneous petitions are closed.